

Durable Power of Attorney Abuse

A National Center on Elder Abuse¹ Fact Sheet for Consumers

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PURPOSE OF FACT SHEET:

Victims of durable power of attorney (DPA) abuse or their family members often need help from the adult protective services, civil justice, or criminal justice systems to stop further abuse by the agent and to recover money, property, or other assets from the agent. But sometimes, as in the case example below, victims are sent from one system to another and don't get the help they need. This fact sheet informs consumers about DPA abuse and what each system can do to help victims.

CASE EXAMPLE:

Helen was 85 and ailing when she made a DPA naming her daughter Susan as her agent. Two weeks later Susan used this DPA to sell Helen's home. Susan placed the sale proceeds into bank accounts that were in Helen's name. Within a year Susan had used her authority under Helen's DPA to withdraw all the money from Helen's accounts. Susan used the money to support her lavish lifestyle and her failing business. When Helen discovered her money was gone, she contacted the local law enforcement agency and was told by a detective that her only option was the civil justice system. Helen could not afford a civil lawyer and the local free legal services program for older people was not able to help her. The adult protective services agency told Helen that they couldn't help her recover her money. Helen lost all hope and died six weeks later.

TERMINOLOGY:

- The "*Principal*" is the person who authorizes another person to act on his or her behalf through a power of attorney or durable power of attorney.
- The "*Agent*" or "*Attorney-in-Fact*" is the person who acts on the principal's behalf through a power of attorney or durable power of attorney.
- A "*Power of Attorney*" (POA) is a legal document through which a principal authorizes an agent to act on the principal's behalf. An agent's authority ends if the principal revokes that authority or if the principal dies. By law, the agent's authority also ends if the principal loses decision-making capacity and can not revoke the agent's authority. The law does this to protect incapacitated principals who are no longer able to monitor their agents and take action if the agents abuse their authority.
- A "*Durable Power of Attorney*" is a POA that remains valid even if the principal loses the legal capacity to revoke the agent's authority. This characteristic makes the DPA a useful tool for people who want to plan for the possibility of incapacity. Planning may avoid the appointment of a guardian or conservator, which occurs

when a court declares that a person lacks decision-making capacity and then appoints someone to make personal or property decisions on behalf of the incapacitated person. As DPAs are used to enable an agent to act on behalf of an incapacitated principal, they usually are written very broadly and give the agent a lot of authority to handle financial matters.

- A “*Springing Durable Power of Attorney*” is a DPA that does not become effective when the principal signs it (unlike the POA or DPA, which become effective upon signing). Instead, it springs into effect at a later time or when a certain event specified in the DPA occurs.
- *Adult Protective Services* (APS) is an agency that receives and investigates reports of suspected elder abuse, including DPA abuse, that are made about older persons (in most states APS also investigates reports about abuse of adults with disabilities). If an APS professional decides that abuse has occurred, then the professional can offer the victim social services that may help prevent future abuse and can refer the victim to a civil lawyer, a law enforcement agency, or a prosecutor. An APS agency may be able to ask a court to declare that the victim lacks decision-making capacity and appoint a guardian or conservator, but APS has no authority to recover the victim’s money or to bring criminal charges against the agent.
- The *Civil Justice System* includes lawyers and courts that handle non-criminal cases. The role of the civil justice system is discussed below.
- The *Criminal Justice System* includes law enforcement professionals, prosecutors, and criminal courts. The role of the criminal justice system is discussed below.

THE PROBLEM:

DPA abuse (sometimes referred to as POA abuse) is the misuse by the agent of the authority granted by the principal. It means making a decision or taking an action that is not in the principal’s best interest. For example, as in the case described above, DPA abuse occurs when the agent spends the principal’s money to benefit the agent, rather than the principal. It may also include forging the principal’s signature on the DPA or coercing an older person to make a DPA against his or her wishes.

Powers of attorney, whether general, durable, or springing, usually are not subject to oversight by a court or third party. If the principal becomes incapacitated and can no longer monitor the agent’s actions, this lack of oversight for a broadly written legal document makes it very easy for an agent to abuse the authority granted by the principal. For this reason, a DPA is often called a “license to steal.”

THE AGENT’S DUTY TO THE PRINCIPAL:

Just like an agent for a sports player or actor, an agent under a DPA has a legal duty to act as a *fiduciary*. Generally this means that the agent is required to act in a trustworthy manner and to make decisions that are in the principal’s best interest or that are consistent with decisions that the principal made for himself or herself before losing decision-making capacity.

THE CIVIL JUSTICE SYSTEM'S ROLE REGARDING DPA ABUSE:

The civil justice system's general role is to help prevent harm from occurring to individuals and to compensate individuals when they are harmed.

It is not necessary to have a civil lawyer prepare a DPA, but a civil lawyer may help prevent DPA abuse from occurring in the first place by writing a DPA that limits the agent's authority or allows third parties to exercise some oversight of the agent.

If an agent has already abused a DPA, then a civil lawyer can help by:

- Helping the principal *revoke* a DPA (this can only be done if the principal still has decision-making capacity)
- Asking a civil court to order the agent to provide an *accounting* of how the principal's money has been spent
- Suing the agent in civil court to un-do transactions conducted by the agent (*rescission*)
- Suing the agent in civil court for stealing the principal's money or assets (*conversion*)
- Asking the court to declare the principal to be incapacitated and appoint a *guardian or conservator* to make decisions on behalf of the principal or to oversee the agent's actions on behalf of the principal

THE CRIMINAL JUSTICE SYSTEM'S ROLE REGARDING DPA ABUSE:

The criminal justice system's general role is to stop crime, punish the people who have committed crime, and protect society from further crimes.

An agent who violates the duty owed to the principal may have committed one or more crimes. The agent may have violated state and federal laws, including laws on:

- Exploitation
- Embezzlement
- Forgery
- Fraud (e.g., credit card fraud, tax fraud, welfare fraud)
- Larceny
- Money laundering
- Theft³

Criminal justice professionals who are investigating or prosecuting DPA abuse should take action to stop the agent from spending or doing anything else with the principal's remaining assets. Asset freezes may be possible. Additionally, prosecutors should ask criminal court judges to order agents to return stolen assets to the victim; this is called *restitution*.

RESOURCES

To find the APS agency in an older victim's community, visit the National Center on Elder Abuse website (www.ncea.aoa.gov) and click on the "State Resources" map. You

can also find the APS agency by calling the nationwide, free Eldercare Locator at its toll-free number: 1-800-677-1116.

A victim of DPA abuse who is age 60 or older may be able to get free civil legal help from a program that is funded through the Older Americans Act. To find the program in an older person's community, see the American Bar Association Commission on Law and Aging State Resource Guide at <http://www.abanet.org/aging/resources/statemap.shtml> or call the nationwide, free Eldercare Locator at its toll-free number: 1-800-677-1116.

A victim of DPA abuse who meets an income and assets test may be eligible for free civil legal help from a program funded through the Legal Services Corporation. To find the program in the victim's community, see the Legal Services Corporation website: www.lsc.gov and click on the "Find Legal Assistance" map.

To find an attorney who specialized in "elder law" (these are not free services) who is licensed to practice law in the state where the older person lives, visit the website of the National Academy of Elder Law Attorneys at www.naela.org and click on the "Locate an Elder Law Attorney" button.

To report suspected DPA abuse to a law enforcement officer, call the police department or sheriff's department in the community where the DPA abuse occurred. If an older person had property in several communities, it may be necessary to call the law enforcement agency in each of those communities.

To report suspected DPA abuse to a prosecutor, call the prosecutor's office in the community where the DPA abuse occurred. The prosecutor may also be known as the district attorney, state's attorney, county attorney, commonwealth's attorney, or some other name.

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² The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

³ This list was developed based on news stories from November and December 2007 in which agents were indicted or successfully prosecuted for DPA abuse.